STRAITS SETTLEMENTS REPORTS.

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[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

October 14, 1940.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J. (F.M.S.), GORDON-SMITH, J.A. & MANNING, J.

December 6, 1940.

K. E. MOHAMED SULTAN MARICAR

v.

THE PRUDENTIAL ASSURANCE CO. LTD.

[SINGAPORE SUIT No. 344 of 1939]

[SINGAPORE CIVIL APPEAL No. 11 of 1940]

Practice and procedure—Claim upon policy of marine insurance—Discovery of "ship's papers"—Discovery under O. 30.

In a claim in the Colony against an underwriter upon a policy of marine insurance the defendant is not entitled as of course to an order against the assured requiring the latter to discover on oath and to produce the ship's papers, the action being stayed in the meantime.

By the law of England at the time when the writ of Summons was issued, namely, on the 4th August 1939, an order for discovery of ship's papers would have been discretionary.

Order 30 of the Rules of the Supreme Court contains full and comprehensive provisions as to discovery and inspection in actions brought in the Supreme Court. If it had been intended that the rules for discovery should be different in the case of marine insurance from what they are in all other actions the rules would have said so. The maxim **expressum facit cessare tacitum** applies strongly in this case. Preliminary r. 2 of the Rules of the Supreme Court therefore has no application in this case. With regard to S. 5 s.s. 1 of the Civil Law Ordinance this section does indeed provide that in all questions or issues which arise or have to be decided with respect to marine insurance the law to be administered shall be the same as would be administered in England in the like case at the corresponding period if such question or issue had arisen or had to be decided in England unless in any case other provision is or shall be made by statute; but this provision only applies to substantive law and does not touch rules of procedure.

The English Order XXXI rule 12A was not introduced into the Colony either by S. 5 of the Civil Law Ordinance or by r. 2 of the Preliminary Rules of the Supreme Court.

Case referred to:—

(1) *Leon & Ors. v. Casey* (1932), 2 K.B. 576.

ADJOURNED SUMMONS.

C. P. Burke for applicants (defendants).

R. Williamson for respondent (Plaintiff).

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell, Ag. C.J.—The claim in this action is upon certain policies of marine insurance, and the defendants are seeking to obtain an order for discovery, extending to the ship's papers and various other documents, whether or not such papers and documents are in the plaintiff's possession or power.

It appears from Arnould on Marine Insurance, 11th edn. p. 1641, that for over a century an underwriter was entitled as a matter of course to an order against the assured requiring the latter to discover on oath and to produce the ship's papers, the action being stayed in the meantime. This procedure was in England saved by S. 73 of the Judicature Act, 1873. In this century the practice of obtaining such orders became more and more common, and so far from advancing the cause of justice, appeared to have precisely the opposite effect. The practice was adversely commented on by Greer, L.J. in *Leon & Ors. v. Casey*[1] where he says "I have known case after case in the Commercial List where defendants, who had no real defence, have been enabled by means of this instrument of oppression to keep plaintiffs out of their insurance money for long periods of time". The learned Lord Justice suggested, therefore, that a discretion should be conferred on the Judge hearing the Summons, as to whether he made the order for discovery of ship's papers or not. Suggestions falling from the Bench are, I understand, always treated with respect, though it must be admitted that they usually fall on barren soil. The learned Lord Justice had the almost unique experience of finding his suggestion bearing fruit, and in 1936 the English Rules of Court were amended by the introduction of O. 31 r. 12a which gave the Court a discretion in granting a "ship's papers" order. So much for the English practice.

In the Straits Settlements the position is different. It is true that by virtue of S. 5 (1) of the Civil Law Ordinance in all questions or issues which arise or have to be decided with respect to marine insurance "the law to be administered shall be the same as would be administered in England in the like case at the corresponding period if such question or issue had arisen or had to be decided in England unless in any case other provision is or shall be made by statute".

There is no doubt that the law to be administered in deciding the issues in this action will be the law of England which would have been applicable if the issues had had to be decided there—that is to say the law of England at the time that the writ was issued, the 4th August 1939. Leaving aside for the moment whether S. 5 s.s. 1 of the Civil Law Ordinance extends to matters of procedure, it is clear that in 1939 an order for the discovery of ship's papers would have been discretionary. Mr. Burke's argument therefore that the practice in the Straits Settlements must be the same as it was in England before the 1936 amendment to the rules is quite untenable so far as it is based on the provisions of the Civil Law Ordinance.

The Rules of the Supreme Court, 1934, must however also be considered. Preliminary r. 2 reads as follows:—

> "Where no provision for procedure is made or no appropriate form is provided by these Orders and Rules or by any law in force in the Colony, the procedure and practice and forms for the time being in force or use in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted."

Now in 1934 the English O. 31 r. 12a had not been enacted, and it can be argued that no special rules of procedure have been laid down in the case of marine insurance and that accordingly the English procedure (prior to 1936) should be adopted. The objection to this line of argument is that a "ship's papers" order is a form of discovery, and that the Straits Settlements O. 30 contains full and comprehensive provisions as to discovery and inspection in actions brought in the Supreme Court, and that there is nothing corresponding to S. 73 of the Judicature Act, 1873, preserving any other practice. Discovery is limited both by r. 11 and by r. 13 of O. 30 to documents in a party's "possession or power". It is difficult to imagine a case in which the maxim *expressum facit cessare tacitum* would apply more strongly. In Broom's Legal Maxims, 10th edn. p. 453, it is remarked *á propos* of this maxim. "It is, indeed, a principle of logic and of common sense, and not merely a technical rule of construction, and might, therefore, be illustrated by decided cases having reference to every branch of legal science". To put the position in simple language—if it had been intended that the rules for discovery should be different in the case of marine insurance from what they are in all other actions the rules would have said so.

To come back to the Civil Law Ordinance, I know of no decided case in which it has been held that the "law to be administered" includes not merely the substantive law but also rules of practice. Discovery is merely one means of establishing the evidence upon which a party relies. It has no bearing upon the law which is to be applied to the evidence which may be brought before the Court. If it were otherwise an action in the Straits Settlements which involved a question of mercantile law would have to follow the procedure laid down in the *White Book* and not that in the Straits Settlements Rules of Procedure, with the result that if the plaintiff did not within seven days of the pleadings take out a Summons for directions, the defendant could apply under English O. 30 r. 8 for the dismissal of the action notwithstanding that there is no such provision in the rules of the Colony. I am glad to note that the learned authors of Van Someren's Commentary also took the view that S. 5(1) 1 of the Civil Law Ordinance was limited to substantive law and did not touch rules of practice (see *Van Someren*, 3rd edn. p. 987).

In my view, therefore, the present application is misconceived and should be dismissed with costs.

Application dismisssed.

THE DEFENDANTS APPEALED.

C. P. Burke for appellants (defendants).

R. Williamson for respondent (plaintiff).

The appeal was heard by the Court of Appeal consisting of **Poyser, (C.J. F.M.S.), Gordon-Smith, (Ag. A.) and Manning, (J).** An oral judgment was delivered by Poyser, (C.J., F.M.S.) dismissing the appeal in the course of which judgment he stated that the members of the Court found themselves in entire agreement with the judgment of Terrell, (Ag. C.J., S.S.) in the Court below. He further held that the English Order XXXI r. 12A had not been introduced into the Colony either by s. 5 of the Civil Law Ordinance or by r. 2 of the preliminary rules of the Supreme Court. The appeal would therefore be dismissed with costs.

Appeal dismissed accordingly.

Solicitors for Respondent (plaintiff)—*Drew & Napier.*

Solicitors for Appellants (defendants)—*John G. Campbell & Co.*